3-2-45—60

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IN THE

Supreme Court of the United States

No. 1031

F. S. LACK,
PETITIONER,

vs.

WESTERN LOAN & BUILDING COMPANY, a corporation, and PEARL ASSURANCE COMPANY, LTD, a corporation,
RESPONDENTS.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

The petition, apparently, is to obtain a review of an order of the Ninth Circuit Court dismissing a second appeal. The dismissal was because the trial court had not entered a final judgment on the first appeal as directed by the opinion and mandate of the Circuit Court.

Reasons given by petitioner for seeking this petition are, (1) that the Circuit Court had "inherent power over its mandate," and (2) the decree entered below was a final decree. (Pet., p. 10)

If the court had "inherent power over its mandate,"

it had the power to require the entry of a decree in accordance therewith. It had so ordered. (R. vol. 3, p. 866) The decree entered by the trial court appears not to be a final one or one of the character ordered.

The opinion of the Circuit Court dismissing the second appeal, points out that petitioner below sought an interlocutory decree, and not a final judgment. He obtained an interlocutory decree not of the exact character sought, but nevertheless interlocutory. On this, the Circuit Court, in the opinion sought to be reviewed here, says:

> "Actually, the interlocutory decree was not pursuant to this court's mandate, for that mandate did not direct the District Court to enter an interlocutory decree, but directed it to enter judgment—meaning, of course, a final judgment.
>
> "The interlocutory decree was, in part, as follows: 'It is Ordered, Adjudged, and Decreed, * * * That this decree is interlocutory; * * * That (the District Court) retains jurisdiction for the determination of the matters herein undisposed of and * * * Lack is hereby granted permission to apply for such other and further relief regarding the matters herein described and for costs of suit incurred in the District Court.'"

Whether the trial court's judgment was final or not, it would also seem that the Circuit Court, when this judgment was presented to it, had the right to refuse a review, because it was not the decree previously ordered to be entered. This, the Circuit Court declared and did.

If this were not so, trial courts could enter their own judgments, disregarding mandates of appellate courts, and the dissatisfied parties could continue to prosecute appeals upon the alleged merits, or demerits or injustice, of such judgments, and litigation would never end. In any event,

there is no basis or reason for burdening this Court with all the mass of records and issues now here presented by petitioner.

The complaint of petitioner now made here, when stripped of extraneous matters, is that the trial court under the mandate in the first appeal could, and should, determine two matters in petitioner's favor: (1) the alleged damage for Western's alleged delay in deeding the real property covered by the lease and option, and (2) petitioner's right to interest on his portion of the money paid into the trial court by the insurance company.

The real property was that which had been damaged by the earthquake and on which the insurance money was paid into court. This insurance money was divided by the Circuit Court on the First appeal. The case was partially reversed and specific directions given to the trial court for entry of judgment on the matters reversed. (134 F. (2) 1017)

Petitioner omits from his petition the specific directions of the mandate to the trial court (R. 4, p. 3) and quotes (Pet. 6) the formal usual printed conclusion that:

> "'You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as according to right and justice and the laws of the United States ought to be had.'"

The petition then goes on to make the complaint, as just above stated, to the effect that the second appeal was to compel the trial court to proceed to assess such alleged damages, and interest, under these general provisions of the mandate. (P. 8-9)

Now, if we assume that this complaint and conten-

tion is correct, all that is necessary is to follow the direction of the Circuit Court, and have a judgment entered in the trial court in accordance with the decision and mandate of the Circuit Court on the first appeal. Then if the trial court refuses to proceed, as petitioner appears to think it should, under these general words in the mandate, he can then apply to the Circuit Court and have it order the proceedings to be taken.

The Circuit Court has not refused to exercise "its inherent power over its mandate." On the contrary, that is just what it has been exercising in directing that a decree be entered in accordance therewith.

BRIEF AND ARGUMENT

Under the Revised Rules of the Supreme Court (Rule 38), there must be "special or important reasons" for a review, in order to justify certiorari. It does not appear that there are any such here.

Nor does this petition come under any of the "character of reasons," as subdivided under Rule 38. It is claimed (P. 3) that the decision "is in conflict with the decisions of this court and the other courts of appeal; that the question of Federal jurisdiction is important * * *; that * * * the circuit court * * * has so far departed from accepted procedure * * * as to call for the power of supervision of the Supreme Court * * *."

Nowhere are these conflicts made to appear. No court decision appears to be cited holding that a circuit court of appeals may not require a final judgment to be entered in accordance with its mandate. Such cases as are cited indicate that circuit courts have this power.

There appears to be no question of federal jurisdiction. There is not shown in the petition any "accepted procedure" in these matters, nor any flagrant departure from any such.

Without following the orderly procedure as required by the Circuit Court of Appeals to have a final judgment entered in accordance with the mandate, and then finding out if the trial court should proceed to assess damages or interest, an attempt is now made here to have this Court review not any direct or definite issue, but any number of questions involving the merits of the original cases, and other factual issues.

Rule 38, par. 2, requires a "short statement" of the matter involved, and particularly disclosing this Court's jurisdiction, the question presented, and the reasons relied on for the allowance of the writ. It makes a failure to "comply with these requirements * * * sufficient reason for denying the petition."

The petition here violates this rule. It is not brief or direct on any of these matters. It and the argument are devoted largely to what it is claimed should be done on the factual issues either already decided, or to be decided, in the further proceedings ordered. These are issues which cannot be reviewed here.

For example, it is contended that in specific performance actions, damages from inexcusable delay are recoverable. This is probably true, but we cannot see how this and other such questions can be expected to be reviewed here now.

The Circuit Court has not denied petitioner the consideration of, or decision on, this, or any matters, in these two consolidated cases.

Vol. III of the record here is largely devoted to the different motions made by petitioner to the Circuit Court to direct the trial court to assess these alleged damages and interest. There were at least four motions filed in the Circuit Court on this, including a petition for a rehearing. (See R. 3, pp. 868, 872, 875, 880, and the recitals on these motions in the Circuit Court's opinion.) Each of these, as the order now involved recites, was considered and overruled or denied. The last one was denied June 24, 1943. (R. 3, p. 890)

These were all filed by the petitioner here, and the jurisdiction of the Circuit Court to decide these matters has never been questioned. If this was a disposition of these matters, no complaint can be made in this Court now, because the time to bring this question here has long since passed.

However, it is suggested in the petition that the Circuit Court didn't decide the matter on the merits, and didn't intend to, but assumed the trial court could, and would, proceed under these general words in the conclusion of the mandate to take such "execution and * * * proceedings * * * as according to right and justice * * * ought to be had," (P. 6) and would assess damages and interest as claimed by petitioner. (P. 31) If this is correct, then the Circuit Court has not decided this matter against petitioner, or at all.

The only way to settle it then, is to get a judgment entered on the mandate as required by the Circuit Court. Then petitioner can proceed thereon to compel whatever action he is entitled to have.

In an apparent attempt to have it appear that petitioner has suffered, or is about to suffer, some gross inequity or injustice, two representations are repeated in

the petition and argument, neither of which is correct. They are: (1) that Case 84 (R1-27) is one to compel conveyance of the real estate by Western, and (2) that petitioner was at some previous time willing to pay the balance of the purchase price and accept conveyance, and that Western refused.

While these appear to be immaterial, we cannot refrain from pointing out that a check of the record will at once show that petitioner's suit 84 was one to compel Western to repair the earthquake damage (R1-32), which both courts below decided it was not required to do.

Also, it will be seen that Western, before either case was filed (R1-731 and 747), and in its complaint (R1-8), and on the pre-trial hearing (R1-238), offered to convey the property and accept the balance due under petitioner's option, as if it had been exercised. The petitioner rejected all such offers. (R1-14 and 238)

However, as stated above, if these issues of damages or interest have been settled by denial of petitioner's motions in the Circuit Court on the first appeal, they cannot be reviewed here, as they are entirely out of time. If they have not been settled, they will be when the judgment is entered by the trial court, as directed in the opinion of the Circuit Court entered December 30, 1944 and now here involved.

It is respectfully submitted that the petition for certiorari should be denied.

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